

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA FEDERATION OF
NATIVES, ET AL.,

Plaintiffs,

v.

GOVERNOR MICHAEL J. DUNLEAVY
in his official capacity, THE STATE OF
ALASKA, OFFICE OF MANAGEMENT
AND BUDGET, and THE STATE OF
ALASKA, DEPARTMENT OF
ADMINISTRATION

Defendant.

Case No.: 3AN-21-06737 CI

**ORDER ON MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION
FOR SUMMARY JUDGMENT**

Introduction

Plaintiffs brought this lawsuit challenging the decision by the Office of Management and Budget to include the Power Cost Equalization Endowment Fund on the list of funds subject to sweep under the provisions of article IX, section 17(d) of the Alaska Constitution. Both parties have moved for summary judgment. Because the Power Cost Equalization Endowment Fund is not in the general fund, it is not subject to the sweep provision of article IX, section 17(d). Therefore, the court grants Plaintiffs' motion for summary judgment and denies Defendants' cross-motion for summary judgment.

Facts and Proceedings

I. The Constitutional Budget Reserve

In 1990, Alaska voters approved the creation of the Budget Reserve Fund, commonly known as the Constitutional Budget Reserve (CBR).¹ The CBR was created through constitutional amendment, resulting in article IX, section 17 of the Alaska Constitution.

Section 17 provides in full:

(a) There is established as a separate fund in the State treasury the budget reserve fund. Except for money deposited into the permanent fund under section 15 of this article, all money received by the State after July 1, 1990, as a result of the termination, through settlement or otherwise, of an administrative proceeding or of litigation in a State or federal court involving mineral lease bonuses, rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments or bonuses, or involving taxes imposed on mineral income, production, or property, shall be deposited in the budget reserve fund. Money in the budget reserve fund shall be invested so as to yield competitive market rates to the fund. Income of the fund shall be retained in the fund. section 7 of this article does not apply to deposits made to the fund under this subsection. Money may be appropriated from the fund only as authorized under (b) or (c) of this section.

(b) If the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year, an appropriation may be made from the budget reserve fund. However, the amount appropriated from the fund under this subsection may not exceed the amount necessary, when added to other funds available for appropriation, to provide for total appropriations equal to the amount of appropriations made in the previous calendar year for the previous fiscal year.

(c) An appropriation from the budget reserve fund may be made for any public purpose upon affirmative vote of three-fourths of the members of each house of the legislature.

(d) If an appropriation is made from the budget reserve fund, until the amount appropriated is repaid, the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in

¹ Article IX, § 17 was placed on the ballot after being passed by a legislative resolution approved by a two-thirds vote of each house in the 1990 legislature. See *Hickel v. Halford*, 872 P.2d 171, 172 (Alaska 1994); ALASKA CONST. art. XIII, § 1.

the budget reserve fund. The legislature shall implement this subsection by law.^{2]}

Generally, the CBR is a constitutionally-created savings account from which the Legislature may appropriate funds under specified circumstances, but to which those funds must be repaid. Section 17(a) established the CBR, provides that certain money received by the State is deposited in the CBR, and authorizes appropriation of money from the fund pursuant to sections 17(b) and (c).³ Section 17(b) authorizes appropriation from the CBR by simple majority vote “[i]f the amount available for appropriation for a fiscal year is less than the amount appropriated for the previous fiscal year.”⁴ In other words, the Legislature may use the CBR to make up budget shortfalls by simple majority vote. Section 17(c) authorizes appropriation from the CBR “for any public purpose” by three-quarters vote of the Legislature.⁵ In other words, the Legislature may use the CBR “for any public purpose” by super-majority vote. Section 17(d) requires repayment of an appropriation made from the CBR, and mandates that, until the CBR is repaid, “the amount of money in the general fund available for appropriation at the end of each succeeding fiscal year shall be deposited in the [CBR].⁶ This budgetary mechanism is commonly known as the “sweep.”

The Legislature may, and routinely has, offset the effect of Section 17(d) or the sweep by a “reverse sweep” through Section 17(c).⁷ During the early 2000s the Legislature borrowed funds from the CBR to make up for budget shortfalls; that debt was repaid to the CBR in 2010.⁸ Since 2016 the Legislature has appropriated money from the CBR to make up for

² ALASKA CONST. art. IX, §17.

³ ALASKA CONST. art. IX, §17(a).

⁴ ALASKA CONST. art. IX, §17(b).

⁵ ALASKA CONST. art. IX, §17(c).

⁶ ALASKA CONST. art. IX, §17(d).

⁷ *Amended Complaint* ¶ 32 (filed 7/26/2021).

⁸ Ch. 13, § 19(a), SLA 2010.

budget shortfalls and has used article IX, section 17(c) to reverse sweep those amounts, preventing the sweep that would otherwise operate pursuant to article IX, section 17(d).⁹ The current debt to the CBR is approximately \$10 billion.¹⁰ This year, the Legislature did not pass a reverse sweep as part of its FY2022 operating budget.¹¹

II. The Power Cost Equalization Endowment Fund

In 2000, the Legislature established the Power Cost Equalization Endowment Fund (PCE Endowment Fund or “the fund”) to provide a long-term, stable financing source for power cost equalization.¹² The PCE Endowment Fund is an endowment intended to fund the Power Cost Equalization and Rural Electric Capitalization Fund (PCE-CAP).¹³ The PCE-CAP, in turn, is used to:

- (1) equaliz[e] power cost per kilowatt-hour statewide at a cost close to or equal to the mean of the cost per kilowatt-hour in Anchorage, Fairbanks, and Juneau by paying money from the fund to eligible electric utilities in the state; and
- (2) mak[e] grants to eligible utilities under AS 42.45.180 to improve the performance of the utility.¹⁴

The PCE Endowment Fund was established as “a separate fund of the [Alaska Energy A]uthority.”¹⁵ The Alaska Energy Authority is a public corporation of the state. It is part of the Department of Commerce, Community and Economic Development but is a separate legal entity.¹⁶ The PCE Endowment Fund is capitalized through legislative appropriations to the fund not designated for annual power cost equalization expenditure, accumulated earnings,

⁹ *Amended Complaint* ¶ 40.

¹⁰ *Opposition and Cross-Motion for Summary Judgment* at *10 (filed 7/20/2021) (hereinafter “*Opposition*”).

¹¹ *Motion for Summary Judgment* at *11 (filed 7/19/2021) (hereinafter “*Motion*”).

¹² AS 42.45.070; Ch. 60, §1, 6 SLA 2000.

¹³ AS 42.45.100(b)(3).

¹⁴ AS 42.45.100(a).

¹⁵ AS 42.45.070(a).

¹⁶ AS 44.83.020.

and other gifts, bequests, contributions, and federal grants not designated for annual power cost equalization.¹⁷ The year it was established, the Legislature appropriated \$100 million to the PCE Endowment Fund from the CBR using its authority under article IX, section 17(c).¹⁸ The Legislature later appropriated other sums into the PCE Endowment Fund from the general fund.¹⁹ As of June 30, 2021, the PCE Endowment Fund contained approximately \$1.15 billion.²⁰

The Commissioner of Revenue is the fiduciary of the PCE Endowment Fund and is directed by statute to manage the fund and invest it to meet the objectives of the PCE-CAP.²¹ By statute, five percent of the monthly average market value of the three previous closed fiscal years, as determined by the Commissioner on July 1, may be appropriated from the PCE Endowment Fund to fund the PCE-CAP, reimburse the Department of Revenue for the costs of establishing and managing the fund, and reimburse other costs of administering the fund.²² This year, the Legislature appropriated \$32.355 million from the PCE Endowment Fund to the PCE-CAP for the fiscal FY2022.²³ That appropriation was not vetoed by the Governor.²⁴

III. The Office of Management and Budget's Determination that the PCE Endowment Fund is Subject to the CBR Sweep

In 2019 the Legislature did not pass a reverse sweep as part of the FY 2020 operating budget.²⁵ Then-Attorney General Kevin Clarkson issued a letter to co- and vice- chairs of the Senate and House Finance Committees stating that the Department of Law had determined

¹⁷ AS 42.45.070(a).

¹⁸ Ch. 75, § 1(b), SLA 2000.

¹⁹ *Eg.* Ch. 82, § 20(j), SLA 2006; Ch.3, § 26(c), FSSLA 2011.

²⁰ *Affidavit of Jabna Lindemuth* Ex. 4 (filed 7/19/2021).

²¹ AS 42.45.080(a).

²² AS 42.45.080(c)(1); AS 42.45.085(a).

²³ Ch. 1, § 57(d), SSLA 2021.

²⁴ *Amended Complaint* ¶ 39.

²⁵ *Motion* at *7.

that, because the PCE Endowment Fund is available for appropriation and has all the essential attributes of general fund money, it should be swept pursuant to article IX, section 17(d).²⁶ At the same time the Director of Office of Management and Budget (OMB) issued a letter to the co- and vice- chairs of the Senate and House Finance Committees outlining which funds OMB had determined were subject to sweep pursuant to article IX, section 17(d).²⁷ The letter set forth OMB's criteria in determining which funds were subject to sweep and included a list of funds.²⁸ The PCE Endowment Fund was on the list.²⁹ Co-Plaintiff Alaska Federation of Natives sent a letter to Clarkson challenging the Attorney General's opinion.³⁰ The Legislature ultimately passed a reverse sweep in July 2019.³¹

This year, the Legislature again did not pass a reverse sweep as part of its FY2022 budget.³² OMB issued a document entitled "Budgetary Issues Due to the CBR Vote Failure" in mid-June.³³ That document identified FY2022 appropriations affected by the Legislature's failure to enact a reverse sweep, and included the Legislature's \$32.736 million appropriation for power cost equalization.³⁴ The document asserts that the appropriations are from funds that lack 2022 revenues or alternate funding sources and provides that "no activity may begin on these programs and projects until the sweep is resolved or an alternate fund is appropriated."³⁵ The Governor has called the Legislature into special session to consider, among other topics, the CBR.³⁶

²⁶ *Affidavit of Jabna Lindemuth* Ex. 4.

²⁷ *Affidavit of Jabna Lindemuth* Ex. 6.

²⁸ *Affidavit of Jabna Lindemuth* Ex. 7.

²⁹ *Affidavit of Jabna Lindemuth* Ex. 8.

³⁰ *Affidavit of Jabna Lindemuth* Ex. 14.

³¹ *See* 2019 Senate Journal 1422; 2019 House Journal 1340.

³² *Motion* at *11.

³³ *Affidavit of Jabna Lindemuth* Ex. 11.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Affidavit of Jabna Lindemuth* Ex. 13. That session has not begun.

Plaintiffs filed this lawsuit on July 19, 2021, asserting in their complaint that by declaring that no funds are available in the PCE Endowment Fund to effect the Legislature's appropriation, the Governor has constructively and unlawfully vetoed the Legislature's valid appropriation for FY2022 rural energy subsidies.³⁷ The complaint alleges that the Governor violated article IX, section 17(d) by designating the PCE Endowment Fund for sweep, and violated the separation of powers doctrine by effectively vetoing decades of appropriations of the Legislature into the PCE Endowment Fund, and by refusing to appropriate (and therefore effectively vetoing the Legislature's transfer of funds from the PCE Endowment Fund to the PCE-CAP for FY 2022).³⁸ Plaintiffs ask the court to declare that the PCE Endowment Fund is not subject to the CBR sweep, and to enter an order prohibiting the Governor from transferring funds out of the PCE Endowment Fund without an appropriation by the Legislature and to return any funds improperly swept.³⁹

At the time the complaint was filed, Plaintiffs filed a motion for summary judgment and a motion for a preliminary injunction.⁴⁰ This court granted Plaintiffs' partially unopposed request to expedite the briefing schedule in this matter, and Defendants filed a cross-motion for summary judgment.⁴¹ The court held oral argument on August 6, 2021 and the parties filed supplemental briefs in response to this court's order on August 9, 2021.

Discussion

The importance of the PCE Endowment Fund and the policy of power cost equalization are not at issue in this lawsuit. Nor is there any dispute whether a sweep of the

³⁷ *Amended Complaint* ¶ 45.

³⁸ *Amended Complaint* ¶ 48-57.

³⁹ *Id.* ¶ 51-52.

⁴⁰ *Motion; Motion for Preliminary Injunction* (filed 7/19/2021).

⁴¹ *Opposition*.

PCE Endowment Fund would cause harm to many rural Alaska communities. Instead, this lawsuit requires the court to interpret article IX, section 17(d) of the Alaska Constitution and determine whether the PCE Endowment Fund is subject to its repayment provision.

I. Legal Standards

Summary judgment must be granted “where ‘there is no genuine issue as to any material fact’ and ‘the moving party is entitled to judgment as a matter of law.’”⁴² “The proper interpretation of a constitutional provision presents a question of law to which the court applies its independent judgment.”⁴³ “Constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense.”⁴⁴ To interpret the provision, the court “should look to the plain meaning and purpose of the provision and the intent of the framers.”⁴⁵

The plain language of article IX, section 17(d) sets forth a two-part test for determining what money must be deposited in the CBR.⁴⁶ The money must be:

- 1) In the general fund; and
- 2) Available for appropriation at the end of each succeeding fiscal year.⁴⁷

Therefore, whether the PCE Endowment Fund is sweepable under article IX, section 17(d) depends on whether it is “in the general fund” and “available for appropriation at the end of [this] fiscal year.”⁴⁸ Plaintiffs argue that the fund does not meet either part of this test.⁴⁹ Defendants argue that the PCE Endowment Fund meets both prongs of the test.⁵⁰

⁴² *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 517 (Alaska 2014) (quoting Alaska R. Civ. P. 56(c)).

⁴³ *Hickel v. Comper*, 874 P.2d 922, 926 (Alaska 1996).

⁴⁴ *Id.* (quoting *Sonneman v. Hickel*, 836 P.2d 936, 940 (Alaska 1992)).

⁴⁵ *Id.* (quoting *Arco Alaska, Inc. v. State*, 824 P.2d 708, 710 (Alaska 1992)).

⁴⁶ See *Hickel v. Comper*, 874 P.2d at 935 & n. 32.

⁴⁷ ALASKA CONST. art. IX, §17(d); see also *Hickel*, 874 P.2d at 935 & n. 32.

⁴⁸ *Id.*

⁴⁹ *Motion* at *13-20.

⁵⁰ *Opposition* at *21-34.

II. The PCE Endowment Fund is Available for Appropriation Within the Meaning of Article IX, Section 17(d)

Whether the PCE Endowment Fund is “available for appropriation” within the meaning of article IX, section 17(d) is governed by the Alaska Supreme Court’s decision in *Hickel v. Cowper*.⁵¹ In *Hickel*, former Governor Steve Cowper challenged as facially unconstitutional parts of AS 37.10.420, which defines terms contained in article IX, section 17, including “available for appropriation.”⁵² In that decision, the court primarily considered the meaning within article IX, section 17(b) (the provision of section 17 that authorizes the Legislature to appropriate from the CBR by simple majority to make up for budget shortfalls).⁵³ The court held that “‘amount available for appropriation’ within the meaning of article IX, section 17 of the Alaska Constitution includes all monies over which the legislature has retained the power to appropriate and which require further appropriation before expenditure.”⁵⁴

In arriving at this definition, the court expressly considered whether an “initial appropriation” to a fund established by the Legislature brought the money in the fund outside the definition of “available for appropriation.”⁵⁵ Reasoning that “one of the fundamental characteristics of an appropriation, in the public law context, is that it authorizes governmental expenditure without further legislative action,”⁵⁶ the court concluded that “because the initial ‘appropriations’ to these funds cannot support any expenditure, the money in these funds remains ‘available for appropriation’ until further appropriations are made.”⁵⁷ The court

⁵¹ *Hickel*, 874 P.2d at 922.

⁵² *Id.* at 925.

⁵³ *Id.* at 926.

⁵⁴ *Id.* at 935.

⁵⁵ *Id.* at 933-934.

⁵⁶ *Id.* at 933.

⁵⁷ *Id.* at 934.

concluded that this was true whether the fund is established in the general fund or in a state agency.⁵⁸

The PCE Endowment Fund is “available for appropriation” according to this definition. Even though the money in the PCE Endowment Fund was appropriated to it by the Legislature, those “initial appropriations” do not support any expenditure. Instead, expenditure of money from the fund requires a further appropriation by the Legislature.⁵⁹ By contrast, if the Legislature appropriates money from the fund to the PCE-CAP Fund, the Alaska Energy Authority may expend that money in the fund without a further act by the Legislature.⁶⁰ Even though the PCE Endowment Fund is “a separate fund of the [A]uthority,” and even though the Authority is a public corporation with a legal existence separate from the department in which it is housed, neither the Authority nor any other entity has authority to expend money from the fund absent further appropriation by the Legislature.

Plaintiffs argue in their motion for summary judgment that the PCE Endowment Fund is not “available for appropriation” because the monies in the fund have already been appropriated, the appropriation has not expired, and the funds remain obligated (to the fund).⁶¹ According to Plaintiffs, the PCE Endowment Fund is not available for appropriation under *Hickel* because, under *Hickel*, “monies which have already been validly committed by the legislature to some purpose should not be counted as available.”⁶² The Plaintiffs reason that the Legislature validly appropriated money into the PCE Endowment Fund, it is still being used for the purpose for which it was appropriated, and it is therefore not available.⁶³

⁵⁸ *Id.* at 933.

⁵⁹ AS 42.45.085(a).

⁶⁰ AS 42.45.100-170.

⁶¹ *Motion* at *18.

⁶² *Reply in Support of Motion for Summary Judgment and Opposition to Cross-Motion* at *19 (filed 8/2/2021) (hereinafter “*Reply*”).

⁶³ *Id.* at *19-23.

But this definition is contrary to the supreme court's holding in *Hickel*, which considers not just whether money was validly appropriated, but also distinguishes between initial appropriations and appropriations within the meaning of section 17, particularly with respect to funds established by the Legislature.⁶⁴ However valid an initial appropriation of money may have been, that money remains available for appropriation within the meaning of article IX, section 17 if “the [L]egislature has retained the power to appropriate and which require further appropriation before expenditure.”⁶⁵

Plaintiffs have also argued, during oral argument, that the court should not apply *Hickel*'s definition of “available for appropriation” to section 17(d) because *Hickel* was concerned primarily with section 17(b), and because section 17(b) concerns money available for appropriation “for a fiscal year” and section 17(d) concerns money available for appropriation “at the end of each succeeding fiscal year.” But there is no basis to ignore the rule of statutory construction that the same words in the same statute (or here, constitutional provision) should be given the same meaning.⁶⁶ And, at the end of each succeeding fiscal year, the funds are available for appropriation because the Legislature retains the power to appropriate those funds at any time and for any purpose.⁶⁷ Moreover, the supreme court did not restrict its definition to section 17(b) and applied it to section 17(d) when it declared AS 37.10.420(b) unconstitutional.⁶⁸

Because the Legislature has retained that authority with respect to the PCE Endowment Fund and because the fund requires further appropriation before expenditure, it

⁶⁴ *Hickel*, 874 P.2d at 930-935.

⁶⁵ *Id.* at 935.

⁶⁶ See *Fancyboy v. Arctic Village Elec. Coop. Inc.*, 984 P.2d 1128, 1133 (Alaska 1999).

⁶⁷ See AS 42.45.070(b); AS 42.45.085(a); see also *Sonneman v. Hickel*, 836 P.2d 936, 939-40 (Alaska 1992).

⁶⁸ *Hickel*, 874 P.2d at 936 & n. 2 (“We see no reason to give ‘available for appropriation’ a different meaning in subsection (d) than we did in subsection (b).”).

is available for appropriation within the meaning of *Hickel* and within the meaning of article IX, section 17.

III. The PCE Endowment Fund is Not in the General Fund

Although the PCE Endowment Fund is available for appropriation, it is not subject to the CBR sweep unless it is also “in the general fund.”⁶⁹ Whether the PCE Endowment Fund is in the general fund presents a more difficult question, because the term “general fund” is not defined in the state constitution, in statute, or by the Alaska Supreme Court.

Plaintiffs argue that the PCE Endowment Fund is not in the general fund because the Legislature established it as a separate fund and because the Legislature validly appropriated the corpus of the fund from the general fund in prior years.⁷⁰ Plaintiffs contend that the CBR repayment provision was never intended or understood to cover separate funds to which the Legislature had already appropriated money for a specific purpose.⁷¹ Defendants argue that the PCE Endowment Fund is in the general fund because it was created by the Legislature, and only money in a fund established by the Constitution is outside the general fund.⁷² According to the Defendants, the Legislature lacks authority to designate funds as outside the general fund for purposes of article IX, section 17(d).⁷³ Defendants argue that adopting the Plaintiffs’ proposed definition of general fund would undermine the repayment policy established by section 17(d) because it would allow the Legislature to evade the repayment obligation by a majority vote by simply declaring a pot of money not part of the general fund.⁷⁴

⁶⁹ ALASKA CONST. art. IX, §17(d); *see also Hickel*, 874 P.2d at 936 & n. 32.

⁷⁰ *Motion* at *13-17.

⁷¹ *Reply* at *11-12.

⁷² *Opposition* at *18-26.

⁷³ *Id.* at *21-22.

⁷⁴ *Opposition* at *28.

a. The Legislature Established the PCE Endowment Fund as a Separate Fund.

By statute, the Legislature created the PCE Endowment “as a separate fund of the [Alaska Energy Authority].”⁷⁵ The Legislature has expressly created many funds and accounts in the general fund for various purposes.⁷⁶ The Legislature has also created separate funds.⁷⁷ In interpreting AS 42.45.070(a), the court must presume “that the legislature intended every word, sentence, or provision...to have some force and effect, and that no words or provision [is] superfluous.”⁷⁸ In addition, “where certain things are designated in a statute, ‘all omissions should be understood as exclusions.’”⁷⁹ Accordingly, the Legislature’s express creation of the fund as “separate” and “of the authority” and its omission of the phrase “in the general fund” must be interpreted to mean that the Legislature intended to create a fund outside the general fund.

⁷⁵ AS 42.45.070(a).

⁷⁶ E.g., AS 06.60.500; AS 06.65.310; AS 08.88.450(a); AS 14.03.125(a); AS 14.11.005; AS 14.11.030(a); AS 14.43.915(a) &(b); AS 18.09.230(a); AS 18.65.225; AS 18.70.360; AS 19.65.060(a); AS 21.55.430(a); AS 23.15.625; AS 23.15.830; AS 23.30.082(a); AS 26.05.665(a); AS 29.60.850(a); AS 30.30.096(a); AS 37.05.289(a); 37.05.500-520; AS 37.05.550(a); AS 37.05.555(a); AS 37.05.560(a); AS 37.05.565(a); AS 37.05.570(a); AS 37.05.580(a); AS 37.05.600(a); AS 37.05.565(a); AS 37.05.570(a); AS 37.05.580(a); AS 37.05.590; 37.05.600(a); AS 37.05.610(a); AS 37.10.200(a); AS 37.14.205(a); AS 37.14.750(a); AS 37.15.011(a); AS 37.15.230(a); AS 38.05.874(a); AS 39.30.095(a); AS 39.60010(a); AS 41.15.180(b); AS 43.23.220(a); AS 43.23.230(a); AS 43.40.010(f), (g), (h), (j); AS 43.52.080(b); AS 43.52.230(a); AS 43.60.050(a); AS 43.61.010(c), (f); AS 43.77.050(a); AS 43.90.400(a); AS 45.56.640; AS 46.03.317(a); AS 46.03.482(a); AS 46.06.041(a); AS 46.08.020(b); AS 46.08.025(b); AS 46.14.270.

⁷⁷ E.g., AS 26.05.263(a) (“The Servicemembers’ Group Life Insurance premium fund is established as a separate fund in the state treasury. The fund consists of appropriations by the legislature to it. Money appropriated to the fund does not lapse”); AS 37.05.540(a) (“There is established as a separate fund in the state treasury the budget reserve fund.”); AS 37.14.031(a); AS 37.14.300(a); AS 37.15.240(a); AS 42.45.010(a); AS 42.45.040(a); AS 42.45.045(a); AS 42.45.100(a) (“The mental health trust fund is established as a separate fund of the Alaska Mental Health Trust Authority.”); AS 43.23.045(a) (“The mental health trust fund is established as a separate fund of the Alaska Mental Health Trust Authority.”); AS 43.23.048(a); AS 43.55.028(a) (“The Alaska clean water administrative fund is established as a separate fund that is distinct from other money or funds in the treasury.”); AS 46.03/036(a) (“The oil and gas tax credit fund is established as a separate fund of the state.”); AS 46.03.032(a) (“The Alaska drinking water fund is established as a separate fund that is distinct from other money or funds in the treasury.”); AS 46.03.038(A) (“The Alaska drinking water administrative fund is established as a separate fund that is distinct from other money or funds in the state treasury.”); AS 47.25.621(c) (“The Alaska affordable heating fund is established as a separate fund to be managed by the Department of Revenue.”).

⁷⁸ *McDonnell v. State Farm Mut. Auto Ins. Co.*, 299 P.3d 715, 721 (Alaska 2013) (internal citations omitted).

⁷⁹ *Alaska State Comm’n for Human Rights v. Anderson*, 426 P.3d 956 & n. 34 (Alaska 2018) (quoting *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991) (quoting *Puller v. Municipality of Anchorage*, 574 P.2d 1285, 1287 (Alaska 1978))) (explaining principle of statutory construction *expressio unius est exclusion alterius*).

However, as Defendants argue,⁸⁰ if the Legislature lacks constitutional authority to take money out of the general fund simply by designating it as so, the Legislature's intent in creating the PCE Endowment Fund as a separate fund outside the general fund does not end the matter. The Alaska Energy Authority's independent, separate legal existence does not change this analysis. Even though the Authority is a public corporation with a separate legal existence, its assets are state assets in the treasury.⁸¹ But the Legislature's establishment of the fund in the authority reflects its intent to place the money not in the general fund.

b. Alaska Statute 37.10.420(b) Does Not Define "General Fund."

In *Hickel v. Cowper*, the court declared unconstitutional AS 37.10.420(b), which provides:

If the amount appropriated from the budget reserve fund has not been repaid under art. IX, sec. 17(d), Constitution of the State of Alaska, the Department of Administration shall transfer to the budget reserve fund the amount of money comprising the unreserved, undesignated general fund balance to be carried forward as of June 30 of the fiscal year, or as much of it as is necessary to complete the repayment. The transfer shall be made on or before December 16 of the following fiscal year.^[82]

The court concluded the definition was unconstitutional because it excluded "restricted funds within the general fund from the calculation of the amount available to pay back appropriations from the budget reserve fund."⁸³ The court recognized that "available amounts outside the general fund, such as the earnings reserve account [ERA], need not be deposited in the budget reserve."⁸⁴ While the court's decision does not answer the question presented by this case—what is the general fund and is the PCE Endowment Fund in it—it

⁸⁰ *Opposition* at *26-30.

⁸¹ *Cf. Laverty v. Alaska R.R. Corp.*, 13 P.3d 725, 732 (Alaska 2000) (assets of Alaska Railroad Corporation are assets of the state for purposes of the public notice clause of Alaska Constitution).

⁸² AS 37.10.420(b).

⁸³ *Hickel*, 874 P.2d at 936.

⁸⁴ *Id.* & n. 32.

does suggest, as argued by Defendants,⁸⁵ that the phrase must be read in light of the purposes of the CBR amendment. But while *Hickel* holds that even restricted funds in the general fund must be included in the definition of sweepable funds (assuming they are also available for appropriation), *Hickel* says nothing about money outside the general fund (except to note that they are not subject to sweep, and to identify the earnings reserve account as such a fund).⁸⁶

c. The Legislative History of the CBR Amendment Does Not Indicate that the Amendment Constrained the Legislature’s Authority to Establish a Fund Outside the General Fund, if the Legislature Had Such Authority.

The voter’s pamphlet for the CBR amendment described the effect of article IX, section 17(d)’s repayment provision: “At the end of each year, the Fund would have to be paid back from money left in the treasury’s general fund.”⁸⁷ The Legislative Affairs Agency Summary stated that “Money that is appropriated from the reserve fund must be repaid. Surplus general fund money must be deposited in the reserve fund at the end of each year until the reserve fund is repaid.”⁸⁸ The statement in support, signed by Representatives Jan Faiks, Kay Brown and Randy Phillips, assert that Ballot Measure Number 1 is the first step Alaskans can take to *effectively* control state spending.⁸⁹ In describing the repayment provision, the statement asserts that “[t]he Legislature will be required to repay any money it appropriates from the Budget Reserve. If the next year revenues are insufficient the Legislature cannot afford to replenish the Budget Reserve, the “debt” will carry forward until it is repaid.”⁹⁰

⁸⁵ *Opposition* at *6-9.

⁸⁶ *Hickel*, 874 P.2d at 936 & n. 32.

⁸⁷ *Affidavit of Jabna Lindemuth* Ex. 1 at *1.

⁸⁸ *Id.*

⁸⁹ *Id.* at *2.

⁹⁰ *Id.*

Representative Terry Martin's statement in opposition did not address the repayment provision.⁹¹

These descriptions to voters of the repayment provision indicate that the repayment will come from "surplus general fund money" and "revenues." The descriptions do not inform the voter that funds designated by statute as separate will be nevertheless be considered part of the general fund and subject to the repayment provision. In describing the repayment provision on the House floor, Representative Brown asserted that the fund would be repaid out of "general fund surpluses that remain at the end of the fiscal year."⁹² In addition, a prior version of SJR 5, which became article IX, section 17, employed the term "from the treasury," a much broader designation.

Nor does the plain meaning of "general fund" support an interpretation of funds established by law as separate from the general fund. The term "general fund" is defined in Black's Law Dictionary (from 1990, when the amendment passed) as:

a collective designation of all the assets of the state which furnish the means for the support for government and for defraying the discretionary appropriations of the legislature. Such are distinguished from assets of a special character, such as the school fund.^[93]

The dictionary definition must be considered in conjunction with any judicial interpretations of "general fund" that would have informed voters and the Legislature at the time the amendment was passed. If the Legislature had authority to establish a fund outside the general fund at the time the CBR amendment was passed, nothing in the legislative history of the amendment indicates that the amendment was intended to curtail that authority. But if

⁹¹ *Id.*

⁹² *See* House Floor Session on SJR5, 16th Leg., 2d Sess., Audio 2, (1:02:51-1:03:10) (Statement of Representative Kay Brown).

⁹³ *Affidavit of Jabna Lindemuth* Ex. 21 (filed 7/19/2021) (*General fund*, BLACK'S LAW DICTIONARY (6TH Ed. 1990)).

the Legislature never had authority to create a fund outside the general fund, the absence of any such legislative history makes sense.

d. The Legislature Is Not Prohibited from Establishing a Fund Outside the General Fund by the Dedicated Funds Clause.

The original articles of the Alaska Constitution do not mention the term “general fund.” However, the dedicated funds clause⁹⁴ provides (in pertinent part) that “[t]he proceeds of any state tax or license shall not be dedicated to any special purpose except... when required by the federal government for state participation in federal programs.”⁹⁵ In *State v. Alex*,⁹⁶ and *Sonneman v. Hickey*,⁹⁷ the Alaska Supreme Court considered the legislative history, origin and purpose of the clause, concluding that its purpose was to retain control over the budget and spending in the legislature and governor.⁹⁸ However, the court in *Alex* recognized that the dedicated funds clause did not prohibit the establishment of certain special funds⁹⁹ and the minutes of the constitutional convention relied on by the court in *Alex* indicate that, at the time, at least some delegates distinguished between “the general fund” and “the treasury.”¹⁰⁰

In 1968, the Legislature enacted AS 37.05.155, which provided for specified “special funds” to be accounted for separately “as accounts in the general fund.”¹⁰¹ In a 1969 opinion

⁹⁴ ALASKA CONST. art. IX § 7.

⁹⁵ *Id.* This article was amended in 1976 when the Permanent Fund was established to create an exception for the restrictions placed on the use of the principal of that fund. HJR 111 (1975).

⁹⁶ *State v. Alex*, 646 P.2d 203 (Alaska 1982).

⁹⁷ *Sonneman v. Hickey*, 836 P.2d 936 (Alaska 1992).

⁹⁸ *Alex*, 646 P.2d at 209-211 (holding that, because the constitution prohibits the dedication of any source of revenue, dedication of salmon assessments to qualified regional associations violated dedicated funds clause); *Sonneman*, 836 P.2d at 938-41 (holding that statute establishing Marine Highway System Fund does not violate dedicated funds clause because legislature may appropriate from the fund for any purpose, but that restriction on executive agency’s authority to request appropriation for capital improvements violated dedicated funds clause).

⁹⁹ *Alex*, 646 P.2d at 210.

¹⁰⁰ See Alaska Const. Conv. Proceed. 2363 (“Now in this case the sinking funds for bonds, all this prohibits is the earmarking of any special tax to that sinking fund. You could still set up a sinking fund from the general fund or the treasury.”).

¹⁰¹ Ch. 5, §1, SLA 1968 (renumbered as AS 37.05.500).

asserting that proposed legislation would violate the dedicated funds clause of the constitution,¹⁰² the Alaska Attorney General opined that “[a]ll public moneys and revenue coming into the state treasury constitute the general fund of the state.”¹⁰³ The opinion acknowledges that the general fund is not specifically created by statute, but that its existence is noted in AS 37.05.155.¹⁰⁴

In 1977, in *Thomas v. Rosen*,¹⁰⁵ the Alaska Supreme Court considered whether a bond issue authorization was an appropriation bill within the meaning of article II, section 15 of the Alaska Constitution.¹⁰⁶ In considering whether the Governor had line-item veto authority over a bond issue authorization, the court was guided by the Wisconsin Supreme Court’s definition of “appropriation” as “the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money and no more, for that object, and no other.”¹⁰⁷ In relying on that definition, the Alaska Supreme Court noted that for its purpose, “the operative phrase ‘public revenue’ is critical since it is the basis of the general fund and special funds from which the legislature may allocate.”¹⁰⁸ In a footnote, the court also acknowledged that the general fund was not specifically created by statute but that it existed, and that its existence was noted in AS 37.05.155.¹⁰⁹ *Thomas*’ description of “the public revenue” as the basis of “the general fund” and “special funds” supports the conclusion that the Legislature had some authority to

¹⁰² ALASKA CONST. art. IX § 7. The dedicated funds clause of the constitution preserves state control over state revenue by (in part) prohibiting funds that the Legislature may only use for a specified purpose or by precluding state agencies from seeking appropriation for a given purpose. *Hickel*, 836 P.2d at 937.

¹⁰³ 1969 Op. Alaska Att’y Gen. No. 5 at *3 (April 15, 1969).

¹⁰⁴ *Id.* at n. 10.

¹⁰⁵ *Thomas v. Rosen*, 569 P.2d 793 (Alaska 1977).

¹⁰⁶ *Id.* at 795.

¹⁰⁷ *Id.* at 796 (quoting *Finnegan v. Damman*, 264 N.W.622, 624 (Wis. 1936)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* & n. 8.

establish funds outside the general fund, so long as it abided by the dedicated funds clause of the constitution.

The term “general fund” appears for the first time in the constitution in 1976, through article IX, section 15, the amendment establishing the Permanent Fund. That amendment established the Permanent Fund, provided for its funding and investment, and provided that “[a]ll income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.”¹¹⁰ Alaska Statute 37.13.145(a) established the Earnings Reserve Account (ERA) “as a separate account in the [Permanent Fund]” and provided that income from the Permanent Fund be deposited into the ERA “as soon as it is received.”¹¹¹ Article IX, section 7 creates an exception for the dedicated funds clause “as provided by article IX, section 15.”¹¹² Recently, in *Wielechowski v. State*,¹¹³ the Alaska Supreme Court held that this provision referred to the dedication of certain specific mineral revenues to the Permanent Fund, and did not permit the Legislature to dedicate the earnings of the Permanent Fund income.¹¹⁴

While the court’s decision in *Wielechowski* does not address the definition of “the general fund,” it adds to the weight of authority that the Legislature’s establishment of a fund outside the general fund does not constitute an unconstitutional dedication of funds. In *Hickel v. Comper*, the court explained that “the money in the [ERA] never passes through the general fund, and is never appropriated as such by the Legislature.”¹¹⁵ In *Wielechowski* the court described the ERA as unique in that it is “”(1) an account existing outside of the general fund; (2) appropriable by the legislature; (3) managed by [Alaska Permanent Fund Corporation]; (4)

¹¹⁰ ALASKA CONST. art. IX § 15.

¹¹¹ AS 37.13.145(a).

¹¹² ALASKA CONST. art. IX § 7.

¹¹³ *Wielechowski v. State*, 403 P.3d 1141 (Alaska 2017).

¹¹⁴ *Id.* at 1148-52.

¹¹⁵ *Hickel*, 874 P.2d at 934.

invested in income-producing assets; and (5) treated differently than other state revenues because of public expectations.”¹¹⁶

The court’s description of the ERA raises an important question for this case: whether the Legislature’s authority to establish a fund outside the general fund for Permanent Fund earnings is bestowed on the Legislature by article IX, section 15, or whether the amendment merely recognized the Legislature’s authority to establish a separate fund and provided that the income from the fund would be deposited into the general fund absent exercise of the Legislature’s preexisting authority? If it is the former, then the Legislature had no authority to establish separate funds when the CBR amendment was adopted. If it is the latter, then the absence of any discussion in the legislative history of the CBR amendment weighs against concluding that the amendment eliminated this power.

Because the term “general fund” was not a term of constitutional significance when the Alaska Constitution was established, the Legislature had authority to establish, by statute, funds outside and separate from the general fund.¹¹⁷ This authority was circumscribed only by the dedicated funds clause. And the Legislature did establish “separate funds.”¹¹⁸ In 1980, the Legislature established the Power Cost Assistance Fund as a “separate fund” of the authority.¹¹⁹ The statute creating that fund was repealed and reenacted the following year, again as a “separate fund” of the authority.¹²⁰ In 1984, the Legislature established the Power Cost

¹¹⁶ *Wielechowski*, 403 P.3d at 1151.

¹¹⁷ The Alaska Constitution vests legislative power in the legislature. ALASKA CONST. art. II § 1.

¹¹⁸ *E.g.* Ch. 68, § 2, SLA 1967; Ch. 130, § 11, SLA 1974; Ch. 218, § 86, SLA 1975; Ch. 277, § 9, SLA 1976; Ch. 124, § 1, SLA 1977; Ch. 181, § 4, SLA 1978; Ch. 83, § 42, SLA 1980; Ch. 118, § 8, SLA 1981; Ch. 133, § 1, SLA 1984.

¹¹⁹ Ch. 83, § 42, SLA 1980.

¹²⁰ Ch. 118, § 8, SLA 1981.

Equalization Fund as a “separate fund” of the authority.¹²¹ These funds existed at the time the CBR amendment was passed in 1990.

Judicial decisions prior to adoption of the CBR amendment acknowledged the existence of the general fund, but also recognized that the Legislature could establish special or separate funds.¹²² Given this authority, and given the absence of any indication in the legislative history that the CBR amendment was intended to circumscribe that authority or to define general fund more broadly than was already defined through statutes, this court concludes that the term “general fund” does not include a separate fund of a public corporation. Accordingly, it does not include the PCE Endowment Fund.

The Defendants argue that adopting Plaintiffs’ proposed interpretation of “general fund” will undermine the repayment provision of article IX, section 17(d), allowing the Legislature to evade the repayment provision by establishing funds outside the general fund by simply majority vote.¹²³ But, absent an express provision in article IX, section 17(d) or other indications that the CBR amendment limited the Legislature’s authority to establish funds separate from the general fund, the court will not lightly infer such a limitation.¹²⁴ The CBR must still be repaid. But because the Legislature established the PCE Endowment Fund as a separate fund, it may not be swept pursuant to article IX, section 17(d). In addition, the funds validly appropriated by the Legislature from the PCE Endowment Fund for FY2022 for the PCE-CAP must be distributed to the PCE-CAP in accordance with the Legislature’s appropriation.

¹²¹ Ch. 133, § 1, SLA 1984.

¹²² See *supra*, nn. 96-100, and accompanying text.

¹²³ *Opposition* at *21-22.

¹²⁴ *Cf. Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976).

Conclusion

Because the Plaintiffs have demonstrated that they are entitled to judgment as a matter of law, and because the Defendants have not shown that they are entitled to judgment as a matter of law, the court GRANTS Plaintiffs' motion for summary judgment and DENIES Defendants' Cross-Motion for Summary Judgment. The Department is PERMANENTLY ENJOINED from sweeping the PCE Endowment Fund into the CBR pursuant to article IX, section 17(d) of the Alaska Constitution. Plaintiffs are ORDERED to file a proposed final judgment within 20 days of service of this decision.¹²⁵

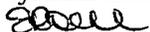
DONE this 11th day of August 2021, at Anchorage, Alaska.



Josie Garton
Superior Court Judge

I certify that on 8/11/2021
a copy of the above was mailed to
each of the following at their
addresses of record:

Erik Groves
Samuel Gottstein
Scott Kendall
John Leman
Jahna Lindemuth
Katherine Demarest
Margaret Paton-Walsh

Elsie Roehl
Judicial Assistant


¹²⁵ Alaska R. Civ. P. 56(c).